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THE BRITISH SCHOOL OF KUALA LUMPUR SDN BHD v. MENTERI SUMBER MANUSIA MALAYSIA & ORS

HIGH COURT MALAYA, SHAH ALAM
AZIMAH OMAR JC
[JUDICIAL REVIEW NO: 25-77-12-2013]
B 7 JULY 2015

ADMINISTRATIVE LAW: *Judicial review – Certiorari – Challenge against Minister's decision to refer employee's representation to Industrial Court – Whether employer and employee reached mutual settlement on dispute – Whether Minister misdirected discretion in making reference – Rules of Court 2012, O. 53 r. 3*

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LABOUR LAW: *Reference – Reference by Minister – Challenge against Minister's decision to refer employee's representation to Industrial Court – Whether employee voluntarily resigned – Whether there was threat of termination or dismissal by employer – Admission by Minister to not have any knowledge of facts – Whether gross indication that Minister had not appreciated full factual matrix of case – Whether Minister misdirected discretion in making reference – Industrial Relations Act 1967, s. 20*

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The third respondent ('employee') was a nursery teacher with the applicant. Entailing her poor performance and absenteeism, a meeting was held and the employee was given a tri-faceted option, which was not an ultimatum of either resign or be terminated/dismissed. However, before a subsequent meeting, the employee decided to resign and consequently a resignation letter was drafted which was later read and voluntarily signed by the employee. In compliance to the resignation letter, the employee was paid her salary. However, ten days after the voluntary resignation, the employee issued a letter to the applicant alleging that she was instead dismissed from her employment and proceeded to file a representation to the Industrial Relations Department. Following the representation, the applicant and the employee were called for a conciliatory meeting, during which the applicant made a full and sufficient statement of fact underlying the employee's voluntary resignation whilst the employee raised the contention that she was forced to sign the resignation letter and asked to be reinstated to her former occupation with full salary and benefits. Following a second conciliatory meeting, the applicant was informed by the Industrial Relations Department that the first respondent, the Minister of Human Resources ('Minister') had decided to refer the employee's representation to the second respondent, the Industrial Court ('IC') for adjudication. Hence, the application by the applicant for judicial review pursuant to O. 53 r. 3 of the Rules of Court 2012 for an order of *certiorari* and an order of prohibition against the Minister in referring the representation to the IC. The applicant's case was that the Minister had misdirected himself in inappropriately exercising his discretion under s. 20

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of the Industrial Relations Act 1967 ('the Act') on the grounds that: (i) the Minister had failed to properly appreciate the factual matrix of the case; and (ii) that the Minister had failed to identify that the case being a settlement *vide* a voluntary resignation to be a case unfit to be referred to the IC as it went against the purpose and the policy of the Act itself.

Held (granting an order of *certiorari* to quash Minister's reference):

(1) The Minister had misdirected himself in concluding a fact that the employee was faced with an ultimatum either to resign or face termination. It was not the fact underlying the employee's voluntary resignation. The tri-faceted option was immensely distinct from what was considered as fact by the Minister. There was never a threat of termination or dismissal and in the absence of such a threat, allegation of forced resignation could never arise. Essentially the employee would not face termination even if she chose not to resign. (paras 31 & 32)

(2) The employee had admitted to not being able to perform her employment with consistent attendance and therefore she opted to resign with the added benefits from the settlement. There was a settlement where the employee would be able to make the best out of the given circumstances that she was not able to perform her obligations under her employment contract. Further, the mere fact that the applicant was the employer of the employee did not raise a presumption of undue influence/pressure to vitiate the valid voluntary resignation. (paras 33 & 36)

(3) The report of the meeting clearly showed that the disciplinary actions would only become relevant if the respondent should continue to be absent if she opted to continue employment from the option. However, there was no future absenteeism committed since the employee opted to voluntarily resign from her employment. Therefore, the question of proper warnings and show-causes was irrelevant. (para 38)

(4) Further, the mere fact that the resignation letter was drafted by the applicant and not the employee did not denote a threat or a situation that the employee was cornered to sign the resignation letter under protest. Instead, it adds to the overwhelming conclusion that the settlement in the resignation letter was indeed a valid and voluntary resignation. (para 46)

(5) The Minister admitted to having no knowledge of salient facts which largely culminate the whole reason the employee was given the tri-faceted option and her voluntary resignation. The mere fact that the Minister admitted to not have any knowledge of the facts was a gross indication that indeed the Minister had not appreciated the full factual matrix of the case and had misdirected his discretion in making the reference. (paras 42 & 43)

(6) The fact that the employee had been given time to consider the option was a factor proving the voluntariness and validity of the resignation. The Minister, in the face of the fact that the parties had reached a mutual settlement of the dispute due to the employee's own admitted inability to guarantee proper performance of her employment, had misdirected himself in exercising his discretion against the objective purpose and policy of the Act when he wrongfully concluded the fact that there was a question of fact and law that the resignation might be forced into or executed by the employee in protest. (paras 47 & 52)

(7) The employee's protest against the allegation of tardiness and absenteeism were never raised during the meetings. The employee also had not averred any contention against the evidence led by the applicant during the conciliatory meetings in her first affidavit in reply. Consequently, the evidential question raised by the employee in her affidavits was a question which was never raised before the Director General of Inland Revenue ('DGIR'). Therefore, the employee's contention could never be a fact and/or contention which were reported by the DGIR and consequently furnished to the Minister for consideration. Thus, the evidential question was irrelevant to the consideration of the Minister as a question of fact or law to warrant reference to the IC. (paras 55-57)

Case(s) referred to:

Abdullah Azizi Abd Hamid v. Menteri Sumber Manusia & Anor [1998] 2 CLJ 297 HC ***(refd)***

Ambank (M) Bhd v. Menteri Sumber Manusia & Anor And Other Appeals [2014] 1 LNS 686 CA ***(refd)***

Chan Soon Lee v. YB Menteri Sumber Manusia Malaysia & Anor [1998] 5 CLJ 133 HC ***(refd)***

City-Link Express (M) Sdn Bhd v. Greenson Dauk [2002] 3 ILR 1219 ***(refd)***

Exxon Chemical (Malaysia) Sdn Bhd v. Menteri Sumber Manusia Malaysia & Ors [2007] 2 CLJ 97 FC ***(refd)***

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals [1997] 1 CLJ 665 CA ***(refd)***

KPMG Consulting (ASPAC) Sdn Bhd v. YB Menteri Sumber Manusia Malaysia & Ors [2004] 5 MLJ 26 ***(refd)***

National Union of Hotel, Bar and Restaurant Workers v. Minister of Labour and Manpower [1980] 1 LNS 50 FC ***(refd)***

Omron Electronics Sales and Services Sdn Bhd v. Phoon Wai Kit & Anor [2010] 7 CLJ 372 HC ***(refd)***

Starhill Golf Resort Bhd v. Mahkamah Perusahaan Malaysia & Anor [2000] 1 LNS 149 HC ***(refd)***

Weltex Knitwear Industries Sdn Bhd v. Law Kar Toy & Anor [1998] 1 LNS 258 HC ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, s. 20(1)

Rules of Court 2012, O. 53 r. 3

For the applicant - Amardeep Singh; M/s Lee Hishammuddin Allen & Gledhill
For the 1st respondent - Hani Haniza FC; State Legal Advisor's Office, Selangor
For the 3rd respondent - Anand Ponnudurai (Kamini with him); M/s Bodipalar Ponnudurai De Silva

Reported by S Barathi

JUDGMENT

Azimah Omar JC:

Background Facts

[1] This is an application by the applicant (The British School of Kuala Lumpur Sdn Bhd) for judicial review pursuant to O. 53 r. 3 of the Rules of Court 2012 (ROC 2012). The applicant has sought from this court *inter alia* for an order of *certiorari* and an order of prohibition against the first respondent, the Minister of Human Resources ("Minister") in referring ("reference") the representation ("representation") made by the third respondent (Kateia Mohieeldin Mohammed Zaied) who is the ex-employee of the applicant ("employee") to the Industrial Court which is the second respondent for an award or decision.

[2] Succinctly put, it is the applicant's case that the Minister had misdirected his discretion under s. 20 of the Industrial Relations Act 1967 (the Act) in making such reference regarding a representation which in essence allegedly is not a case fit to be referred to the Industrial Court.

[3] The applicant is a private co-educational international school which facilitates education based on the curriculum of England and Whales.

[4] The employee commenced her employment as a nursery teacher with the applicant on 15 August 2009. (See exh. EVC1 of the applicant's affidavit in support ("AIS"))

[5] Thereafter, concerns and issues arose regarding the employee's alleged tardiness, absenteeism without notifying the applicant and also leaving work early in her performance under the employment contract. Evidence of which has been categorically appended in exh. EVC1-A of the applicant's affidavit in reply against the Minister's affidavit in reply. (There are contentions made against these evidences by the employee very late in her case (in her affidavits in reply). This court shall delve into these contentions later in this judgment).

[6] Entailing her poor performance and absenteeism, a meeting was held late in 15 February 2013, the same day the employee was absent from work for the third time that week. One David Kirkham ("witness") was appointed to oversee and witness the meeting without a single iota of protest by either of the parties. During the meeting, the employee was informed of the concerns, complaints and emails from parents who were concerned with

their children's education due to the employee's absenteeism and tardiness. Thereafter, the employee was given a tri-faceted option with three options to choose from ("option").

The Option Is NOT An Ultimatum Leading To Termination Or Resignation

[7] At this juncture, this court must highlight that the option is not a simple two choices ultimatum. A simple appreciation of the full extent of the factual matrix would reveal that the option was tri-faceted. The option at any material time is NOT an ultimatum of either resign or be terminated/dismissed. Distinctively, the tri-faceted option instead offers the following options, WITHOUT any of the options drawing an inevitable conclusion of termination/dismissal:

(i) shape up and continue with the employment; or

(ii) risk disciplinary actions if the same poor performance during employment is continued after the meeting; or

(iii) voluntarily resign with added benefits should the employee could not promise appropriate performance of her obligations under the employment contract.

Warnings And Show-Causes Are Irrelevant

[8] Furthermore, it must be highlighted here that the risk of disciplinary action is NOT with regard to the employee's past misconducts before the meeting, but instead the probable future continued misconduct should the employee opts to continue with the employment. Thus, the question of proper warnings and show-causes is irrelevant in the present case as there are no future misconducts committed since the employee opted to voluntarily resign from her employment. The tri-faceted option has been reported in the following excerpt of the witness's report. (See exh. EVC5 of the AIS):

> Adam asked Katya how did she think she was coping with the demand of the job and her husband's current health situation, she said she was struggling but wanted to work. Adam explained to Katya that we were **happy for her to continue in work** but the current levels of absence … looked very likely to increase given her current situation. There had been verbal concerns raised by some of her class parents … and we received a letter from a concerned parent who … voiced her concerns over the disruption to this continued absence was having on her daughter in the class.
>
> Adam spoke very calmly and explained to Katya that from an employer's point of view that **continued absences over and above the current allocation** … would lead to disciplinary action … He then showed her two examples of warnings that she could **expect** – failure to contact employer when absent and failure of duty of care.

Adam **suggested** that if Katya wanted to look after her husband she **could resign and not lose any benefits** … He said he could try to get her pay until the end of term, with all her benefits. This was offered only as an option.

Katya asked for time to talk it over with her husband. Adam agreed.

[9] After given time to consider the option, another meeting was held to discuss the employee's decision over the option given in the previous meeting with Adam and the witness. This meeting was conducted on the immediate weekday after the previous meeting, on 18 February 2013 attended by the witness, Emma Clearly ("Emma") and the employee. The employee informed that she has already emailed her decision to resign to Adam even before the meeting. The conduct of the meeting was reported in the witness's report dated 27 May 2013 (see exh. EVC4 of the AIS) and also Emma's report of even date (see exh. EVC- of the AIS). Upon the employee's decision, Emma proceeded to draft the resignation letter which was later read and voluntarily signed by the employee.

Threat Is Irrelevant During 18 February 2013 Meeting

[10] It must be highlighted at this juncture that any averment of threat during this meeting is verily irrelevant as the decision to resign as per the terms agreed was reached by the employee even before the meeting itself *vide* the alleged email to Adam. Thus, it cannot be said that any statement during the meeting had cornered the employee in making her decision to sign the resignation letter.

[11] The terms of the voluntary resignation are as follows (see exh. EVC3 of the AIS):

(i) The employment will officially end on Monday 18th February 2013.

(ii) The employee will be paid in full up until the end of academic term 2, Wednesday 22nd March 2013.

(iii) The employee will receive 2 business class one way flights to destination of choice.

[12] In compliance of the above resignation letter, the employee's salary was paid (up to even 31 March 2013) into the employee's husband's account on 26 March 2013, which was the usual payment arrangement between the applicant and the employee.

[13] At this juncture, the overwhelming conclusion is already that there is a mutual settlement of the concerns between the applicant and the employee.

[14] However, ten days after the voluntary resignation, the employee has issued a letter dated 28 February 2013 to the applicant alleging that she was instead dismissed from her employment. (See exh. EVC8 of the AIS):

A I was further informed if I did not sign a particular document, I would be dismissed. Under these circumstances, I signed a document dated 18th February. This is to put on record that I consider the actions of the school as amounting to dismissal …

There Is No Threat Leading The Employee To Sign The Resignation Letter

B **[15]** Again, the assertion of threat is negated by the employee's own reported assertion that her decision to resign was already emailed to Adam even before the meeting on 18 February 2013.

[16] The employee proceeded to file a representation to the Industrial C Relations Department. Following that representation, the applicant and the employee were called for a conciliation meeting on 29 May 2013 *vide* a letter issued by the Industrial Relations Department. (See exh. EVC9 of the AIS)

[17] Following the letter calling for the conciliation meeting, the applicant had duly furnished the Industrial Relations Department with the requisite D employer's information form under s. 20 of the Act. A simple scrutiny of this information form would show that the applicant has sufficiently furnished all the facts underlying the employee's voluntary resignation covering the whole extent of the following:

a. Employee's tardiness, absenteeism and overall poor performance;

E The employee had often been late, absent without medical leave and without informing the School and leaving work early throughout her employment.

Furthermore, the Employee failed to submit an Assessment of her class in July 2011 …

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b. The first meeting on 15.2.2013 where the Employee was given the tri-faceted Option;

The Employee was absent on Friday 15.2.2013. This was the 3rd time that week that she was absent … At the said meeting … If the Employee **continued being absent** without informing the G School, the School would have no choice but to commence disciplinary proceedings. **The decision whether the Employee should resign or continue to work at the School with consistent attendance was left to the Employee …**

c. Complaints and concerns of parents regarding Employee's poor H **performance;**

The School had received e-mails from parents who voiced their concerns on the unsettling effect of the Employee's extended and unplanned absences on their child. Also, parents did e-mail the School as they were unhappy with the way the Employee handled I their child concerning swimming lessons.

d. The fact that the Employee could not guarantee her consistent attendance to work;

The School asked the Employee how she would cope with the demands of her job and her husband's ill health, as the School needed her to be consistent with her attendance at work. **The employee advised that she could not guarantee her consistent attendance at work.**

e. The fact that the Employee was given the whole weekend to consider the option; and

The decision whether the Employee should resign or continue to work at the School with consistent attendance was left to the Employee to mull over the weekend.

f. The fact that Employee was not dismissed and advised of her own voluntary resignation on 18.2.2013:

On 18.2.2013, the Employee advised the School that she had decided to resign from her employment with immediate effect.

[18] During the conciliation meeting, the applicant has made a full and sufficient statements of fact underlying the employee's voluntary resignation. During this meeting, there was never any contention against the evidence of the employee's poor performance. The only contention raised by the employee was that she was forced to sign the resignation letter and she asked to be reinstated to her former occupation as a nursery teacher with full salary and benefits.

[19] Another conciliation meeting was conducted on 5 June 2013 in which the applicant had furnished all the supporting documents and advised the industrial relations officer of its decision to not reinstate the employee. (See exh. EVC11 of the AIS for the letter and enclosed supporting documents)

[20] On 14 June 2013 the applicant proceeded to furnish a written representation to the Industrial Relations Department echoing the material facts and contemporaneous documents of its contention with a request that the same would be represented to the Minister to enable him to exercise his duty under the Act. (See exh. EVC12 of the AIS)

[21] The same representation was informed to have been forwarded to the Industrial Relations Department in Putrajaya *vide* a letter dated 28 June 2013 which was received by the applicant on 9 September 2013. (See exh. EVC13 of the AIS)

[22] Entailing the above, the applicant was informed *vide* a letter dated 28 August 2013 from the Industrial Relations Department which was received by the applicant on 11 September 2013 that the Minister has decided to refer the employee's representation to the Industrial Court for adjudication.

[23] The applicant's case is against this reference. The applicant's case can be summarised in the following manner:

[24] The Minister had misdirected himself in inappropriately exercising his discretion under s. 20 of the Act on the grounds that:

i. The Minister had failed to properly appreciate the factual matrix of the case. In that the Minister had failed to consider facts which he ought to consider and had considered matters which ought not to consider; and;

ii. The Minister had failed to identify that the case being a settlement *vide* a voluntary resignation to be a case unfit to be referred to the Industrial Court as it goes against the purpose and the policy of the Act itself.

[25] Now, it is plain to this court that the second ground of contention of the applicant can only be answered if the first ground of contention has been determined. Thus, this court shall first delve into the underlying facts of this case and identify if there were indeed any misdirection on the part of the Minister in exercising his discretion under s. 20(1) of the Act in referring the representation to the Industrial Court for adjudication.

Have The Minister Properly Appreciate The Full Factual Matrix Of The Case?

[26] There is little dispute on the underlying law and principle governing the Minister's duty to examine and appreciate the full facts of the representations and report he received from the director general of industrial relations regarding the dispute and the conduct of the conciliation meetings.

[27] This court is guided by the High Court decision in *Chan Soon Lee v. YB Menteri Sumber Manusia Malaysia & Anor* [1998] 5 CLJ 133 at p. 136:

> Just as a workman is entitled to the said protection, similarly the law recognises the right of an employer to dismiss his workman with just cause or excuse. The minister when acting under s. 20(3) of the Act has to see that these two distinct rights are safeguarded **based on the facts and material placed before him** in the notification made to him by the director-general under s. 20(2) of the Act … the role of the minister is to ascertain **whether on the facts and material placed before him,** the representation raises serious questions of fact or of law calling for adjudication by the Industrial Court.

[28] On the same principle, the employee in its submissions has referred to the Federal Court decision in *Exxon Chemical (Malaysia) Sdn Bhd v. Menteri Sumber Manusia Malaysia & Ors* [2007] 2 CLJ 97:

> It meant that there should be an **objective examination of the factual matrix available before the Minister** in order to ascertain whether a reasonable person, in similar circumstances, would have arrived at the decision which the Minister had done.

[29] It is also a proof of a misdirection of a Minister's discretion if it can be proven that he has either considered irrelevant facts or failed to consider relevant facts. This court is guided by the case referred by the employee herself in *Malayan Banking Bhd v. Association of Bank Officers, Peninuslar Malaysia & Industrial Court* [1988] 1 CLJ (Rep) 183:

> …the Court can interfere with the Minister's decision if he … has *taken into consideration matters which he ought not have taken into account or vice versa*; or has otherwise gone wrong in law.

[30] The Minister in his submission adds that the Minister in exercising his discretion in referring a representation to the Industrial Court should only consider facts and matters which were furnished to him by the DGIR and not to external facts which were raised after his exercise of discretion.

The Minister Fails To Appreciate The Fact That There Was Never A Threat Of Dismissal Vide An Ultimate Either To Resign Or Be Terminated OR The Minister Has Wrongfully Considered The Non-Existent Fact Of An Ultimatum Or Threat

[31] Against the vivid facts presented *vide* the applicant's information form and written representation, the Minister surprisingly has misdirected himself in concluding a fact that the employee was faced with an ultimatum either to resign or face termination in para. 14 of the Minister's affidavit in reply. This is by and large not at all the fact underlying the employee's voluntary resignation. It is reiterated here that the tri-faceted option instead offers the following options, WITHOUT any of the options drawing or risking an inevitable conclusion of termination/dismissal:

(i) shape up and continue with the employment; or

(ii) risk disciplinary actions should the same poor performance during employment is continued after the meeting; or

(iii) voluntarily resign with added benefits should the employee could not promise appropriate performance of her obligations under the employment contract.

[32] The option is immensely distinct from what was considered as fact by the Minister. The fact could not be more different. There was never a threat of termination/dismissal. In absence of such threat, it can never arise any allegation of forced resignation or termination. Essentially, the employee would NOT face termination even if she should choose not to resign.

The Minister Is Wrong In Considering A Misconceived Fact That The Settlement Through Resignation Is Instead A Termination/Dismissal

[33] It is on the employee's own admission to not being able to perform her employment with consistent attendance that the employee opted to resign with the added benefits from the settlement. Indeed there was a settlement here in which the employee would be able to make the best out of the given circumstances that she is not able to perform her obligations under her employment contract.

[34] Such resignation after being informed of poor performance is indeed a valid resignation. This court is guided by the case of *City-Link Express (M) Sdn Bhd v. Greenson Dauk* [2002] 3 ILR 1219:

> He may be told of his failure to perform satisfactorily and/or of his misconduct and warned that his future prospects in the employer's establishment are bleak if he does not shape up. The issue of resignation may well crop up. Where *an employee who had been told of the several respects in which he has failed to perform,* or to meet the standards of conduct expected of his employer, decides that it would be wise to make the best out of a bad situation and that it would be in his interest to resign *it would be a matter of some difficulty for the court to find that the claimant left the employer because he had been forced to tender his resignation. To do so would be to ignore the reality of workplace dynamics and interaction between employer and employee.*

[35] The above excerpt is verily similar and applicable to the present case. The employee was informed of her poor performance, and upon realisation that she could not perform her obligations, the employee herself saw that it is much more desirable to tender her resignation. Indeed this resignation is a valid resignation in settlement of the parties' dispute.

[36] Furthermore, the mere fact that the applicant is the employer of the employee does not raise a presumption of undue influence or pressure to vitiate the valid voluntary resignation. The court is guided by the High Court decision in *Starhill Golf Resort Berhad v. Mahkamah Perusahaan Malaysia & Anor* [2000] 1 LNS 149:

> There is no presumption of undue influence in an employer and employee relationship …

The Minister Is Wrong In Considering The Absence Of Warnings Or Show-Causes By The Applicant

[37] One of the grounds the Minister finds it fit to refer the representation to the Industrial Court was the fact that the applicant never gave warnings or opportunity to show-causes to the employee. (See para. 22(e) of the Minister's affidavit in reply)

[38] This clearly is an irrelevant fact to be considered. There is no necessity for cautions or warnings as of yet. The report of the meeting clearly shows that these disciplinary actions would only become relevant if the respondent should continue to be absent if she opted to continue employment from the option. Thus, the question of proper warnings and show-causes is irrelevant in the present case as there were no future absenteeism committed since the employee opted to voluntarily resign from her employment.

The Minister Admits To Not Having Knowledge Of Salient Facts Leading Up To The Employee's Voluntary Resignation

[39] It is indeed alarming that the Minister himself would admit to having no knowledge of salient facts which were already furnished to the DGIR and to his office *vide* the employer's information form (exh. EVC10 of the AIS)

and the applicant's written representation (exh. EVC1-A of the applicant's affidavit in reply to the Minister's affidavit).

[40] The Minister had averred in para. 12 of his affidavit in reply that he has no knowledge of the matters averred in paras. 6 and 7 of the AIS. Paragraphs 6 and 7 reveal a succinct statement of salient facts which led to the resignation of the employee:

> 6. The 3rd Respondent had in the course of her employment often been late, absent without medical leave and without informing the Applicant and also leaving work early. This resulted in the Applicant having to make last minute arrangements for additional staff members to cover the 3rd Respondent's classroom until her arrival at work …
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> 7. The 3rd Respondent would also often ask to leave early in the afternoon …

[41] Similarly, the Minister had averred and admitted in para. 15 of his affidavit in reply to have no knowledge of the salient facts set out in para. 11 of the AIS. Paragraph 11 of the AIS sets out and exhibits proof of payment of salary as per the agreed terms of the employee's voluntary resignation. (See EVC7 of the AIS)

[42] These were facts which were repeatedly echoed in the information form, applicant's written representation, and even on both of the conciliatory meetings held at the Industrial Relations Department. These facts largely culminate the whole reason the employee was given the tri-faceted option and also her voluntary resignation.

[43] The mere fact that the Minister would admit to not know or not have any knowledge of these facts is a gross indication that indeed the Minister had not appreciated the full factual matrix of the case and has misdirected his discretion in making the reference.

The Minister Has Wrongfully Considered The Fact That The Resignation Letter Was Drafted By The Applicant

[44] The Minister has averred in para. 14 of his affidavit in reply that he has considered the fact that the resignation letter was drafted by the applicant and not the employee herself.

[45] This is an irrelevant fact to be considered to determine the validity of the settlement *vide* the voluntary resignation of the employee. This court is guided by the High Court decision in *Starhill Golf Resort Berhad v. Mahkamah Perusahaan Malaysia & Anor* [2000] 1 LNS 149 where the court had held:

> In this regard, the First Respondent (at pages 28 to 30 of the Award) had only considered the assertion of the Second Respondent as his proof of his involuntary resignation. **The First Respondent in arriving at this conclusion had incorrectly taken into consideration the following matters**:
>
> (i) the preparation of the resignation letter by the Applicant …

[46] Thus, just the mere fact that the resignation letter was drafted by the applicant and not the employee does not denote a threat or a situation that the employee is cornered to sign the resignation letter under protest. Therefore, this further adds to the overwhelming conclusion that the settlement in the resignation letter indeed is a valid and voluntary resignation.

The Minister Has Failed To Consider The Fact That The Employee Was Given Two Days To Consider The Option As A Proof Of Voluntariness

[47] The Minister has considered an untrue fact that despite the two days afforded to the employee to consider the option, the employee was in a position cornered to resign or face termination. This fact is utterly untrue. Instead, the fact that the employee is given time to consider the option, is a factor proving the voluntariness and validity of a resignation. This court is guided by the case of *Weltex Knitwear Industries Sdn Bhd v. Law Kar Toy & Anor* [1998] 1 LNS 258:

> To make out a case that her resignation was not voluntary and her resignation was obtained under undue influence, misrepresentation, fraud or the like, the employee has to establish that she was not allowed time to think over the matter ...

See also *Omron Electronics Sales and Services Sdn Bhd v. Phoon Wai Kit & Anor* [2010] 7 CLJ 372.

Has The Minister Misdirected His Discretion In Contradicting The Purpose, Object And The Policy Of The Act Itself?

The Minister Has Not Exercised His Discretion In Promoting The Purpose And Policy For Industrial Harmony And Settlement Prescribed Under The Act

[48] The preamble of the Act stipulates the overriding policy, object and purpose of the Act to be:

> An act to promote and maintain industrial harmony and to provide for the regulation of the relations between employers and workmen and their trade unions and the prevention and settlement of any differences or disputes arising from their relationship and generally to deal with trade disputes and matters arising therefrom.

[49] Precedents have even decided that the Minister must exercise his discretion in promoting such settlement of dispute. This court is guided by the Federal Court decision in *National Union of Hotel, Bar and Restaurant Workers v. Minister of Labour and Manpower* [1980] 1 LNS 50; [1980] 2 MLJ 189 at p. 191:

> Thus we must construe the Industrial Relations Act 1967, to determine its policy and object. It cannot be gainsaid that the intention of the Act is to regulate the relations between management and labour and to prevent and settle trade disputes arising therefrom.

[50] Furthermore, the Court of Appeal has also held in *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals* [1997] 1 CLJ 665 at p. 708; [1996] 1 MLJ 481 at p. 61:

> Put simply, the first question which the Minister ought to ask himself is whether the way in which he proposes to exercise his discretion will have the effect of preventing or settling the particular dispute; for that is what the Act is primarily aimed at …

[51] In fact, the Court of Appeal has recently decided in *Ambank (M) Bhd v. Menteri Sumber Manusia & Anor and Other Appeals* [2014] 1 LNS 686; [2014] 6 MLJ 377 that:

> [31] More to the point at hand, we have judicial pronouncements which make it clear that the Minister's exercise of discretion or administrative powers under the provisions of the IR Act must always be within the objectives of the legislation and the scope of his statutory responsibilities.

[52] Thus, upon the authorities above, it is clear that the Minister, in the face of the fact that the parties have reached to a mutual settlement of the dispute (in concluding and agreeing to the terms of the voluntary resignation) because of the employee's own admitted inability to guarantee proper performance of her employment, has misdirected himself in exercising his discretion against the objective, purpose and policy of the Act when he wrongfully concluded the fact that there is a question of fact and law that the resignation might be forced into or executed by the employee in protest.

[53] Again, the employee was never under any threat of termination although if she opted to not resign. She even has the option to continue her employment save that she is able to perform her employment appropriately. Therefore, there never arose, any fact to indicate that there might be a question of fact or law that the resignation is involuntarily made to warrant reference to the Industrial Court. Vitiating such mutually agreed settlement of dispute would directly contradict the policy of the Act.

There Is No Question Of Fact Or Law In The Evidence Of The Employee's Misconducts And Poor Performance

[54] Now, although the employee has raised contentions against the applicant's evidence of her tardiness and poor performance, it must be noted that these contentions were only made late in the employee's case. In that it was only raised in the employee's affidavits but was never raised by the employee in any of the meetings at the school and also the conciliatory meetings at the Industrial Relations Department.

[55] The reports (exhibited and forwarded to the Industrial Relations Department by the applicant) reveal that the employee has never raised an inkling of protest against the allegation of tardiness and absenteeism during the meetings conducted on 15 February 2013 and 18 February 2013.

[56] In fact, the employee in her first affidavit in reply to the AIS has not averred any contention against the evidence led by the applicant on her tardiness and misconduct during the conciliatory meetings on 29 May 2013 and 5 June 2013 in answering the applicant's AIS particularly on the facts of the conciliatory meetings in paras. 13 to 16 of the AIS. (See para. 9 of the employee's first affidavit in reply dated 9 August 2014 for the employee's reply to the applicant's averments regarding the conciliatory meetings)

[57] Thus, it is safe to infer that the evidential question raised by the employee in her affidavits was a question which was never raised before the DGIR. Therefore, the employee's contention on the evidence led by the applicant could never be a fact and/or contention which were reported by the DGIR and consequently furnished to the Minister for consideration. Thus, such evidential question is irrelevant to the consideration of the Minister as at the time of his exercise of his discretion, this line of fact and contention was never brought before him. Therefore, the employee's contention here cannot be considered by the Minister as a question of fact or law to warrant reference to the Industrial Court. This court is guided by a case which was referred by the Minister in his submissions which is the case of *Abdullah Azizi Abd Hamid v. Menteri Sumber Manusia & Anor* [1998] 2 CLJ 297 at pp. 301 to 302:

> He relies purely on the notification made to him by the Director General under sub-s. (2) …With the notification he would have before him naturally the report of the proceedings including whatever evidence both oral and documentary presented therein. Upon all these matters placed before him, the Minister would make a study and decide as to whether the representation is frivolous or vexatious. He is not allowed to consider other irrelevant matters not placed before him by the Director General. That being the case, what took place before the Director General during conciliation proceedings is crucial.

Court's Findings

[58] In light of all the deliberations above, it is this court's findings that there are overwhelming evidences that the Minister has misdirected himself in exercising his discretion, in that he has not considered facts which he ought to consider and *vice versa*, he has in the face of a clear settlement has contradicted the object, purpose and policy of the Act and has failed to apply proper rules of law in determining the validity of the employee's voluntary resignation.

[59] It must be minded here that although the Minister has averred in his affidavit that he has considered all the facts brought forth to him from the DGIR, it is not necessarily sufficient to prove he has considered the full factual matrix of the case. Especially in circumstances (alike in the present case) where there are overwhelming evidences that the Minister has not properly appreciated the factual matrix of the case.

Court's Decision And Directions

[60] In light of all of the above findings, it is this court's decision that the applicant has successfully proven to this court that the Minister had in fact committed errors of law in arriving to his decision to refer the third respondent's representation to the Industrial Court. Hence, this court hereby grants the following relief:

i. an order of *certiorari* to quash the Minister's reference dated 28 August 2013

On The Issue Of Costs

[61] The parties have agreed to an agreed costs of RM5,000. This court hereby orders the respondents do pay the applicant sum of RM5,000 in costs.